M/S. HISHAM, SOBRI & KADIR, ADVOCATES & SOLICITORS

v.

LIM CHAU SENG & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING MOTION NO. 32-64-86]
9 FEBRUARY 1987

CIVIL PROCEDURE: *Contempt of Court - Committal - For failing to comply with order of Court - 1st defendant undischarged bankrupt - Whether a proceeding against an undischarged bankrupt could be instituted - Bankruptcy Act 1967 - Sections 8, 10(2), 24(4) - Companies Act 1965 - Section 125.*

CIVIL PROCEDURE: *Whether application for committal prior to granting of leave amounted to substantial defect.*

This was an application by the plaintiff to commit the 1st and the 2nd defendants to prison for contempt of Court for failing to comply with the order of court dated 10 December 1986. The 1st defendant had been an undischarged bankrupt since 1986 and continued to represent himself as a director. Notice of motion seeking leave to commit and the notice of originating motion were filed on the same day i.e. 31 December 1986, and leave was granted subsequently on 5 January 1987. The date of hearing of the originating motion was given after leave was obtained. The two points argued are:

(1) Whether the present proceeding against the 1st defendant, a bankrupt, could be instituted without joining the Official Assignee to replace him;

(2) Whether the proceedings in this action are void for non-compliance with O. 52 of the Rules of the High Court 1980.

Held:

[1] As neither the plaintiff is a creditor of the 1st defendant and the proceeding is not against the 1st defendant's assets, s. 8 of the Bankruptcy Act does not apply. As there is no application for stay made by the 1st defendant, the proceedings will continue. Accordingly the preset proceedings against the 1st defendant are properly instituted.

[2] The irregularity in the present proceedings is of a technical nature which does not amount to a nullity and therefore can be corrected under O. 2 of the Rules of the High Court 1980.

[Preliminary objections raised by defendants dismissed with costs.]

Cases referred to:
Realisations Industrielles Et Commerciales S.A. v. Loescher and Partners [1957] 3 All ER 241
Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors. [1986] CLJ (Rep) 58

Legislation referred to:
Bankruptcy Act 1967, ss. 8, 8(1), 10(2), 24(4)
Courts of Judicature Act 1964, s. 13(2)
Companies Act 1965, s. 125
Rules of the High Court 1980, O. 52 rr. 1(2)(a)(ii), (2)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 3, para. 372

For the plaintiff - Lim Jit Boo (Charles Surendra Rajah with him); M/s. Hisham, Sobri & Kadir
For the defendants - S.P. Annamalai (Goh Lim Eam with him); M/s. Annamalai & Co. and M/s. Johari, Goh & Associates

JUDGMENT

Mohamed Dzaiddin J:

This is an application by the plaintiff to commit both the 1st and 2nd defendants to prison for contempt for failing to comply with the order of court dated 10 December 1986 whereby they were ordered to forthwith deliver to the plaintiff a continuing and irrevocable banker's guarantee in favour of the plaintiff's clients.

Incidently, there is a pending application before my brother Edgar Joseph Jr. J for setting aside the said Order of 10 December 1986 which I have just been informed would be withdrawn. An application for an adjournment of this present proceeding was made by Mr. Goh for the defendants to me which I disallowed. I was and am still satisfied that based on the affidavits of the two defendants affirmed on 15 January 1987 (encl. 11) the application for a stay of this proceeding is devoid of any merit and merely a process of delay.

However, what is important in this present proceeding is the disclosure during the hearing on 21 January 1987 that the 1st defendant had been an undischarged bankrupt since September 1986 and had continued to represent himself as a director of Kedah Utara Development Sdn. Bhd. and had wilfully attested documents and affirmed affidavits in his capacity as a director of the said company. What is more shocking was the fact that his solicitor, Mr. Goh did not even know nor did he ever disclose to Counsel of this fact until it came to light at the present hearing. As a result of this, Mr. Goh applied to discharge himself as Counsel for the 1st defendant.

In my opinion, this is a serious matter because s. 125 of the Companies Act 1965 clearly provides that any undischarged bankrupt shall not act as Director or directly or indirectly takes part in or is concerned in the management of any corporation except with the leave of the Court and any person who contravenes this section shall be guilty of an offence under the Act, the penalty of which is imprisonment of 6 months or a fine of RM2,500 or both. From these facts, the 1st defendant has committed an offence and in view of the above, I am forwarding a copy of this judgment to the Public Prosecutor through the Deputy Public Prosecutor, Pulau Pinang to take necessary action against the 1st defendant for contravening s. 125 of the Companies Act 1965.

On 7 February 1987, I heard further arguments by Counsel concerning the present application. Two preliminary points were raised before me, one of which would be of great interest to the practitioners. The two preliminary points are as follows:

1) Whether the present proceeding against the 1st defendant, a bankrupt, could be instituted without joining the Official Assignee to replace him;

2) Whether the proceedings in this action are void for non-compliance with O. 52 Rules of the High Court 1980.

Mr. Annamalai, Counsel for the 2nd defendant, submitted that in view of the fact that the 1st defendant is an undischarged bankrupt, the present proceeding commenced by the plaintiff against him is misconceived on the ground that the bankrupt has no capacity to be sued in Court or served with any legal process. This committal proceeding was commenced against him in December 1986 subsequent to his adjudication as a bankrupt in September 1986.

Counsel felt that only the Official Assignee who can be sued in place of the bankrupt and who ought to have been issued with the process. Counsel further contended that the present proceeding therefore would require amendments since the Court was aware of the 1st defendant's bankruptcy. In the circumstances, the 1st defendant cannot purge his contempt as he is a bankrupt.

In support of the arguments, Mr. Annamalai referred to s. 8(1) of the Bankruptcy Act which made the present proceeding null and void because no leave of Court was obtained. Section 8(1) states as follows:

> On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the Court and on such terms as the Court may impose.

Counsel further referred to s. 24(4) of the Bankruptcy Act which provides that when a debtor is adjudged bankrupt his property is vested in the Official Assignee. Mr. J.B. Lim contended that s. 8 of the Act did not apply to the present committal proceeding. His argument was that the plaintiff is not a creditor of the 1st defendant in this originating motion, and in the Civil Suit No. 428 of 1986 in which the order of 12 December 1986 was granted, the 1st defendant was not even a party. The present proceeding for committal is not against the bankrupt's assets. As such the committal proceeding is properly taken up and cannot be void.

I think it must first be clearly appreciated that in Civil Suit No.428 of 1986, the plaintiff sued Kedah Utara Development Sdn. Bhd. and one other named defendant, Yaakob bin Othman. The 1st defendant was one of the directors of the said company until he became a bankrupt. The suit was never filed against the 1st defendant personally. On the other hand, the contempt proceeding in originating motion 64 of 1986 are directed against both defendants to compel them as directors and officers of Kedah Utara Development Sdn. Bhd. to comply with the court order dated 10 December 1986. As neither the plaintiff is a creditor of the 1st defendant and as the proceeding is no against the bankrupt's assets, in my judgment s. 8 of the Bankruptcy Act does not apply. Even under s. 10(2) of the same Act, the sub-section merely gives the Court a discretion at any time after the presentation of the bankruptcy petition to stay any action, execution or other legal process against the property or person of the debtor. However, such an application must be made by the debtor. Assuming that sub-section 10(2) applies in the present proceeding, there is no such application for stay before me and until such a stay is ordered the proceeding will continue. In *Realisations Industrielles Et Commerciales S.A. v. Loescher and Partners* [1957] 3 All ER 241 the headnote reads:

> On the day before the hearing of an action in the High Court for breach of contract, the defendant was adjudged bankrupt, on his own petition, in a County Court. When the action came on for hearing the defendant did not appear, and the question arose whether the adjudication order operated as a stay of the action.
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> **Held:** the proceedings against the defendant were not stayed automatically as a result of the adjudication order made against him, because by s. 9(1) of the Bankruptcy Act, 1914, a discretion to stay proceedings against a bankrupt at any time after the presentation of a bankruptcy petition was given both to the Bankruptcy Court and to the Court in which the proceedings were pending, and, therefore, the proceedings continued until an order was made staying them.

Although the Court may grant the stay in a proper case, there are certain proceedings which will not be stayed. Proceedings of punitive character will not be restrained under the Court's power of staying action. The prohibition of proceedings after the making of a receiving order does not take away the jurisdiction of the Court to prevent the debtor from being committed to prison, if he has by his conduct rendered himself liable to imprisonment. [*Halsbury's Laws of England* 4th Ed. Vol. 3 para. 372.]

Therefore, for the above reasons, my answer to the first preliminary point raised, is that the present proceeding against the 1st defendant who is an undischarged bankrupt is properly instituted.

The second preliminary objection relates to the non-compliance with O. 52 rr. 2 and 3 of the Rules of the High Court. According to Mr. Annamalai (which is confirmed by the documents themselves) the notice of motion seeking leave was filed on 31st December 1986 and leave was subsequently granted by me on 5th January 1987. But, the notice of motion for committal and the statement under O. 52 r. 2 Rules of the High Court were also filed on the same day i.e. 31st December 1986. Mr. Annamalai was of the view that the plaintiff had filed the present application for committal prior to the granting of leave, which he considered as amounting to a substantive defect. Mr. J.B. Lim had conceded that both motions were filed simultaneously on 31st December 1986 but contended that the notice of originating motion for committal was not intended to be entered for hearing and to be proceeded for hearing until leave was first obtained. In fact, the date of the hearing of this originating motion was given after leave was obtained. He submitted that this was an irregularity which could be cured or corrected under O. 2 of the Rules of the High Court. As for my part, after having gone through the entire file and relying myself on the Supreme Court decision in *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors.* [1986] CLJ (Rep) 58, I am satisfied that the irregularity in the present proceeding is of a technical nature which does not amount to a nullity and therefore can be corrected under O. 2 of the Rules of the High Court.

Finally, there was a third objection raised by Mr. Annamalai where he submitted that based on the true construction of O. 52 r. 1(2)(a)(ii) Rules of the High Court, this application ought to have been heard by the High Court which granted the injunction order i.e. Court No.1. Counsel also submitted that the contempt proceeding should have been commenced in the same Civil Suit No. 428 of 1986 and not by a separate originating motion. Without wasting much time, in my opinion, there is no merit in this objection because we are all fully aware that this Court is a Court of competent jurisdiction and is empowered to try and punish any contempt of itself under s. 13(2) of the Courts of Judicature Act 1964.

For the above reasons, the preliminary objections raised by the defendants are hereby dismissed with costs.

Also found at [1987] 2 CLJ 57